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Supreme Court, U. S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1972

72-578

In Re:

BRUCE W. BUBLICK, A Witness Before The July, 1972 Grand Jury

Petitioner.

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Bruce W. Bublick prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

Opinion Below

The United States District Court For The Northern District of Illinois did not render a written opinion. The judgment order of contempt and commitment of the Court is printed in Appendix 1. The opinion of the United States Court of Appeals for the Seventh Circuit, unreported, is printed in Appendix 2.

Jurisdiction

The opinion of the United States Court of Appeals for the Seventh Circuit was filed on September 8, 1972, and the mandate issued on the same date.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Question Presented

The question presented to this Court is whether the Fifth Amendment privilege against self-incrimination which would otherwise protect an attorney in declining to produce documents relating to the attorney's private law practice, is lost solely because the attorney's law practice has been organized as a professional service corporation formed under the Illinois Professional Service Corporation Act (Ill. Rev. Stat. 1971, ch. 32, §415 et seq.), and subject to the requirements of Illinois Supreme Court Rule 721 (Ill. Rev. Stat. 1971, ch. 110A, §721).

Constitutional and Statutory Provisions Involved

The Fifth Amendment to the United States Constitution provides in part that:

> "No person . . . shall be compelled in any criminal case to be a witness against himself . . .".

The Illinois Professional Service Corporation Act (Ill. Rev. Stat. 1971, ch. 32 §415 et seq.), and Illinois Supreme Court Rule 721, (Ill. Rev. Stat. 1971, ch. 110A §721) are set forth in Appendices 3 and 4 of this petition.

Statement of the Case

This case involves a proceeding by the United States Government to enforce a *subpoena duces tecum* issued by the July, 1972 Grand Jury in the Northern District of Illinois addressed to Bruce W. Bublick, Ltd. or any authorized officer or agent. The subpoena, set forth in Appendix 5, calls for the production of "corporate minute books, bank statements, cancelled checks, deposit slips and check ledgers for the period from April 30, 1970 to and including the present."

Bruce W. Bublick, Ltd. is a professional corporation organized under the Illinois Professional Service Corporation Act. (Ill. Rev. Stat. 1971, ch. 32 § 415 et seq.) The articles of incorporation were introduced into evidence by the government on the motion to compel compliance. It was stipulated at the hearing in the District Court that petitioner Bruce W. Bublick is the sole incorporator, director and shareholder of Bruce W. Bublick, Ltd. Mr. Bublick is an attorney who has been licensed to practice law in Illinois since 1964. The documents subpoenaed are nothing more than the personal records of Bruce Bublick as a sole practitioner of law.

On August 29, 1972, Mr. Bublick appeared before the July, 1972 Grand Jury in response to the *subpoena duces tecum*. When called upon to produce the material requested in the subpoena, Mr. Bublick declined on the ground that coerced production of the documents would violate his Fifth Amendment privilege against self incrimination.

Immediately upon the refusal of Mr. Bublick to produce the documents called for in the subpoena, the government sought an order by the United States District Court for the Northern District of Illinois compelling produc-

tion of the documents. The Honorable Julius J. Hoffman heard oral arguments and took evidence on the question. The government argued that Mr. Bublick should be ordered to produce because the documents are property of the corporation and hence are not protected by the privilege against self incrimination. The government cited cases holding that the Fifth Amendment privilege does not apply to business corporations.

Petitioner argued that the records in question were records of his law practice which are "his personal records and do not constitute corporate records" within the meaning of the Fifth Amendment privilege against self-incrimination simply because his law practice has been incorporated under the Illinois Professional Service Corporation Act. Petitioner pointed out that the recently created device of a professional service corporation is very different from the usual business corporation. He argued that professional service corporations were created to provide lawyers, doctors and other professional persons with tax benefits under the federal tax laws, while retaining the private and personal nature of the services performed.

Both parties agreed that this is an issue of first impression, and that they could find no cases on the applicability of the Fifth Amendment to the records of professional service corporations.

On August 31, 1972, Judge Hoffman ruled that the documents called for in the subpoena are not protected by the privilege against self incrimination and must be produced. The District Judge entered an order directing Mr. Bublick to produce the documents called for in the *subpoena duces tecum*.

Mr. Bublick was then taken before the grand jury and called upon to produce the documents pursuant to Judge Hoffman's order. Mr. Bublick produced the corporate minute book, but reasserted his Fifth Amendment rights in refusing to produce any other documents. He stated that all of the other documents called for are records of his private practice of law.

The government then brought Mr. Bublick before Judge Hoffman on a motion that he be held in contempt for his failure to produce. After hearing argument, Judge Hoffman held Mr. Bublick in contempt of court, and ordered Mr. Bublick into the custody of the United States Marshal until such time as he produced the documents or until the life of the July, 1972 Grand Jury expired.

Counsel for Mr. Bublick requested Judge Hoffman to set reasonable bail pending appeal. Judge Hoffman refused to grant bail and ordered Mr. Bublick into immediate custody. A request for a stay pending presentation of a motion for bond pending appeal to the Court of Appeals for the Seventh Circuit was also denied by Judge Hoffman. Mr. Bublick was taken into custody by the United States Marshal but was released a few hours later under an order of the Court of Appeals staying the order of contempt until further order of court. The parties thereupon submitted short memoranda to the Court of Appeals on the issue of whether Mr. Bublick should be released on bail pending appeal.

On September 8, 1972, without receiving briefs on the merits and without hearing oral argument, the Court of Appeals entered a two page order disposing of the case on the merits. The Court held that the privilege against

self incrimination cannot be asserted by Bruce W. Bublick, Ltd. The Court of Appeals did not follow the customary 21 day rule for issuing mandates (Rule 41 Federal Rules of Appellate Procedure) but ordered that the mandate issue forthwith.

The government promptly demanded that Mr. Bublick surrender to the United States Marshal to begin to serve his sentence under the contempt citation.

On September 11, 1972, Mr. Bublick appeared before the July 1972 Grand Jury under compulsion of the foregoing orders and produced the documents called for by the *subpoena duces tecum*. Before doing so, Mr. Bublick explained that he did not waive his rights under the Fourth and Fifth Amendments to the United States Constitution, and that he complied only because failure to do so would subject him to immediate and prolonged incarceration.

REASONS FOR GRANTING CERTIORARI

This case involves the availability of the privilege against self incrimination to the sole incorporator, director and shareholder of a professional service corporation. The case presents a question of first impression on an issue of vital importance to all professional service corporations throughout the nation. According to a 1970 survey of the American Bar Association there were 1093 lawyers practicing law as professional corporations in the United States. Lawyers World 24-25 (Nov-Dec 1970) This number has no doubt increased since 1970. In the last few years a vast majority of states have passed statutes to allow the formation of professional corporations. These statutes are designed to allow professionals to obtain equal federal tax treatment with other types of corporations while maintaining the highly private and personal nature of their professional services. The ruling of the Court of Appeals in this case affect lawyers, physicians, dentists, veterinarians, accountants, architects and other professions which can be incorporated under state professional service corporation acts. This Court should speak on the important issue of when the privilege against self incrimination applies to the records of professional people who have organized under these statutes. The lower state and federal courts throughout the nation need guidance from this Court on this important question.

I.

A NOVEL QUESTION OF NATIONWIDE IMPORTANCE IS PRESENTED CONCERNING THE RIGHT OF A LAWYER WHO INCORPORATES UNDER A STATE PROFESSIONAL SERVICE CORPORATION STATUTE TO ASSERT THE PRIVILEGE AGAINST SELF INCRIMINATION.

Almost sixty years ago this Court held that the privilege against self incrimination cannot be asserted by the sole shareholder of a business corporation in order to avoid disclosure of corporate records. *Grant* v. *United States*, 227 U.S. 74, 76 (1913). The *Grant* case was preceded by this Court's decision in *Hale* v. *Henkle*, 201 U.S. 43, 70 (1906) holding that the Fifth Amendment is not available to multi-owner business corporations.

In 1944 in a case involving an unincorporated labor association, this Court formulated a flexible test for determining whether the privilege can be asserted by state-created entities. In *United States* v. *White*, 322 U.S. 694 (1944) this court held, that courts should look to substance rather than form in determining whether the privilege applies. The Court said (at 701):

> "The test, rather, is whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only. If so, the privilege cannot be invoked on behalf of the organization or its representatives in their official capacity."

The issue presented in the case at bar, involving a professional service corporation, has never been examined by this Court. This case involves not only

a sole shareholder, but also a single officer and director—the sole practitioner who incorporated under a special state statute designed to afford equality of tax treatment to professionals. Note, Professional Corporations: Analysis Under the Tax Reform Act And Survey of State Statutes, 58 Geo. L. Rev. 487 (1970); Hanson, Professional Corporations, 59 Ill. B.J. 196 (1970).

More importantly, the state statutes which authorize professionals to incorporate have established an entirely new and unique kind of entity, drastically different from the common commercial corporation. In Illinois, there are fundamental differences between corporations formed under the Illinois Professional Service Corporation Act (Ill. Rev. Stat. 1971 ch. 32, §§415-1 to 415-17), and those formed under the Illinois Business Corporation Act (Ill. Rev. Stat. 1971 ch. 32, §§157.1 to 157.166). The stock of a professional service corporation cannot be sold publicly, nor may it be sold privately to anyone not holding the requisite professional status. (Ill. Rev. Stat. 1971 ch. 32, §415-11). The professional shareholder does not enjoy limited liability (Ill. Rev. Stat. 1971 ch. 32, §415-8), one of the basic benefits accorded commercial corporations.

To govern attorneys who incorporate under the Illinois statute, the Illinois Supreme Court has adopted a special rule (Ill. Rev. Stat. 1971 ch. 110A, §721), providing that only attorneys licensed in Illinois may be shareholders, officers or directors; that the corporation is subject to "the standards of professional conduct applicable to attorneys licensed by this Court" and that:

> (b) This rule does not diminish or change the obligation of each attorney engaged in the practice of law in behalf of the corporation or association to conduct himself in accordance with the standards of professional conduct applicable to attorneys licensed by this court. Any attorney who by act or omission causes the

> corporation or association to act in a way which violates standards of professional conduct, including any provision of this rule, is personally responsible for such act or omission and is subject to discipline therefor. Any violation of this rule by the corporation or association is a ground for the court to terminate or suspend the right of the corporation or association to practice law or otherwise to discipline it.

The rule also provides that ". . . Nothing in this rule modifies the attorney-client privilege." Thus, the *personal* aspect of the practice of law, and the attorney-client relationship, are carefully preserved. Any attorney practicing law under the Act does so as an individual with respect to his clients, and not as a corporate officer, director or employee in the commercial sense. The attorney maintains his individual status and cannot take advantage of the corporate structure to avoid liability or adherence to the Code of Professional Ethics.

The Rule also provides that before the corporation may engage in the practice of law, the shareholders must obtain a certificate of registration issued by the Illinois Supreme Court. The certificate must be obtained annually and is non-assignable. The Rule provides further:

> "(d) The articles of incorporation or association shall provide and the shareholders of the corporation or members of the association shall be deemed to agree by virtue of becoming shareholders or members that all shareholders or members shall be jointly and severally liable for the acts, errors and omissions of the shareholders or members and other employees of the corporation or association arising out of the performance of professional services by the corporation or association while they are shareholders or members."

Judged by the *White* test, it is clear that petitioner is entitled to claim the protection of the Fifth Amendment

privilege with respect to the records of his law practice. The "corporation", Bruce Bublick Ltd., embodies and represents only Mr. Bublick's interests; there are no "common or group interests" involved (*United States* v. *White*, 322 U.S. at 701) which cause the privilege to be lost. After incorporation, as before, the petitioner has engaged in the practice of law as a sole practitioner.

Whatever may be the eventual resolution of this issue by this Court, we submit that the question is one of undoubted nationwide importance and concern, which warrants prompt review by this Court. Thousands of professional men and women throughout the country who have taken advantage of state statutes such as Illinois' are affected by the ruling of the courts below. They are entitled to know at the earliest time whether by incorporating they have forfeited a right accorded by the United States Constitution to all citizens, including attorneys (*cf. Spevak* v. *Klein*, 385 U.S. 511 (1967)), and to many state-created entities.

II.

THIS CASE IS NOT MOOT.

After the Seventh Circuit Court of Appeals affirmed petitioner's contempt conviction and commitment and ordered the mandate to issue forthwith, petitioner, under compulsion of immediate incarceration, produced the subpoenaed documents while reasserting his rights under the Fifth Amendment. As a result, the nature of some of the relief which petitioner requires has been altered, and the question arises whether petitioner's constitutional claim has been rendered moot. In fact, the controversy has not abated, and though its procedural posture has changed, the case is clearly not moot. Nevertheless, it is appropriate to raise and discuss the mootness issue *sua sponte*.

The question of mootness arises in federal cases under the constitutional provision requiring a case or controversy in all judicial matters. Art. III, U.S. Const. If the controversy between the parties has been resolved and the parties are no longer adverse to each other, the case is considered moot. Wright, Federal Courts 33-44 (1963). However if there is a continuing controversy between the parties, the case is not moot merely because a change in circumstances occurred between the time the case arose and the time the case was to be decided. See *Aetna Life Ins. Co.* v. *Haworth,* 300 U.S. 227, 240-41 (1937).

In the instant situation, the case is not moot for two reasons. First, petitioner stands convicted of contempt of court. Conviction of contempt under the Omnibus Crime Control Act 28 U.S.C. §1826 especially for a lawyer, carries with it continuing consequences which petitioner is entitled to have removed if the conviction was improper even though he is no longer incarcerated. *Sibron* v. *New York,* 392 U.S. 40 (1968).

As the Court said in *Sibron* (at 55):

> "The Court thus acknowledged the obvious fact that most criminal convictions do in fact entail adverse legal consequences. The mere 'possibility' that this will be the case is enough to preserve a criminal case from ending 'ignominiously in the limbo of mootness.'"

Secondly, there is a continuing controversy between the petitioner, Bruce Bublick, and the government concerning the use of the documents involved in this case. By producing the documents under compulsion, petitioner did not waive his Fifth Amendment rights. He can reassert his

Fifth Amendment privilege if the government attempts to use the documents, or any fruits of the documents, at a criminal trial. *United States* v. *Ryan*, 402 U.S. 530, 532 N. 3 (1971); *United States* v. *Blue*, 384 U.S. 251, 255 (1966). By the same token, he could move to suppress the use of these illegally seized documents before the July 1972 Grand Jury. *Gelbard* v. *United States*, 92 S. Ct. 2357, 2366-67 (1972); *People* v. *Maslowsky*, 34 Ill. 2d 456, 216 N.E.2d 669 (1966).

The return of a wrongfully obtained indictment is itself a wrong which the courts can and should avoid, and where the court can determine that wrongfully obtained evidence or procedures are being used before the Grand Jury it should move promptly to avoid the wrong. *In re Fried*, 161 F.2d 453, 458 (2d Cir. 1947); *People* v. *Sears*, 49 Ill. 2d 14, 273 N.E. 2d 380 (1971).

Under the peculiar circumstances of this case, the controversy can only be resolved in an appropriate way by this Court taking the case now. In light of the ruling of the Seventh Circuit the filing of a new case in the District Court to suppress the use of the documents before the Grand Jury would be a useless act, since the Chief Judge of the District Court will necessarily follow the erroneous decision of the Seventh Circuit. An appeal from a ruling denying the motion to suppress would likewise be useless since the Seventh Circuit would merely reaffirm the position it has already expressed.

This Court should not require petitioner to waste the time of the District Court and Court of Appeals in useless procedural maneuvers solely to "reestablish" a controversy which in fact still exists and will continue to exist until decided by this Court. The Court is entitled to treat the matter now as involving a request to suppress the im-

properly seized documents and prevent their use before the Grand Jury or otherwise.

Such a procedure is not novel. For instance, in *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965) this Court granted relief to the petitioners based on the facts of the case as they stood at the time the Court rendered its decision rather than on the basis of the facts as they stood when the case was decided by the District Court. There was a substantial change in circumstances.

The *Dombrowski* case originated as a suit to enjoin the threatened indictment of the plaintiffs under the Louisiana sedition laws. The District Court denied relief. *Dombrowski* v. *Pfister*, 227 F. Supp. 556 (E.D. La. 1964). The plaintiffs appealed.

While the case was pending in this Court, a state grand jury indicted the plaintiffs. Thus this Court could no longer prevent an indictment from being returned as originally requested.

Rather than hold that the return of the indictment rendered this part of the case moot, this Court simply shifted its relief to meet the new conditions and entered an order directing the lower court to enjoin the prosecution of the indictment. The plaintiff was not required to take the useless step of filing a new case asking that the indictment be quashed, and await the inevitable disposition of that case before obtaining review by this Court.

The *Dombrowski* case shows that this Court will grant relief based on the case as it exists at the time of its decision rather than on the basis of the facts as they existed at the time the case arose.

If petitioner in this case is forced to go through the useless motion of resubmitting the issue to the trial court and

Court of Appeals, an improper indictment may well be returned and the prosecution well under way, perhaps even on trial, before the question can be re-presented to this Court.

There is a continuing controversy in this case which can only be resolved by this Court.

Conclusion

For the reasons set forth above, we pray that this Court grant this petition and issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit so that this case may be reviewed on the merits.

Respectfully submitted,

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APPENDIX

APPENDIX 1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:

BRUCE W. BUBLICK, A WITNESS BEFORE THE JULY 1972 GRAND JURY

No. 72 GJ 5136

JUDGMENT AND COMMITMENT

On motion of James R. Thompson, United States Attorney for the Northern District of Illinois for an order by the Court to enforce its order of August 29, 1972, heretofore entered in the above entitled matter, the respondent, Bruce W. Bublick, appearing before the Court in person and with counsel, and it having been proven that respondent has refused and would continue to refuse to furnish to the July 1972 Grand Jury documents and records called for in a subpoena duces tecum, to wit, "corporate minute books, bank statements, cancelled checks, deposit slips and check ledgers for the period from April 30, 1970 to and including the present" and all records relating to Bruce

W. Bublick, Ltd., 111 E. Wacker Drive, Chicago, Illinois, an Illinois corporation, and the Court having heard argument of counsel:

It Is Adjudged that respondent, Bruce W. Bublick, is in direct and continuing contempt of this Court for his failure to obey the order of this Court, dated August 31, 1972, heretofore entered herein.

It Is Therefore Ordered that respondent Bruce W. Bublick, be and hereby is committed to the custody of the United States Marshal for the Northern District of Illinois until such time as said respondent shall obey said order, or until such time as the July 1972 Grand Jury shall be discharged from further service, whichever is sooner.

ENTER:

JUDGE
United States District Court of the Northern District of Illinois

Dated at Chicago, Illinois

this ..... day of ..... 1972.
MDS:jh

APPENDIX 2

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

September 8, 1972

Before
Hon. Wilbur F. Pell, Jr., *Circuit Judge*
Hon. John Paul Stevens, *Circuit Judge*
Hon. Robert A. Sprecher, *Circuit Judge*

In Re:

BRUCE W. BUBLICK, A Witness Before the July, 1972 Grand Jury,

Appellant

No. 72-1739

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
(GJ 5136)

This is an appeal from the order of the district court entered on August 31, 1972, finding the appellant, Bruce W. Bublick, in contempt of court for refusing the [sic] produce certain records and documents before the July, 1972 Grand Jury. The appellant has filed an emergency motion for bond pending appeal, with a memorandum in support, the Government has filed an answer to the motion, and the

appellant has filed a reply to the answer. We have reviewed the motion papers and the record on appeal and have decided to dispose summarily of the appeal without briefs and oral argument, pursuant to Rule 2 of the Federal Rules of Appellate Procedure.[1]

Appellant is an attorney licensed to practice law in the State of Illinois and is the sole incorporator, director, and shareholder of Bruce W. Bublick, Ltd., a professional corporation organized under the Illinois Professional Service Corporation Act. (Ill. Rev. Stat. ch. 32 §415 et seq.) The Grand Jury subpoena duces tecum directed "Bruce W. Bublick, Ltd., or any authorized officer or agent" to produce "corporate minute books, bank statements, canceled checks, deposit slips and check ledgers for the period from April 30, 1970 to and including the present." The sole issue which is properly before us in this appeal is whether the privilege against self incrimination applies to the records of an individual lawyer practicing as a professional service corporation under the Illinois Professional Service Corporation Act. No question of the attorney-client privilege is involved. We hold that for purposes of determining whether the privilege against self-incrimination attaches to the appellant's refusal to produce documents and records, the professional service corporation is to be treated as any other corporation.

Accordingly, the stay heretofore entered by this Court on August 31, 1972, is vacated and the judgment of the district court is AFFIRMED.

The mandate shall issue forthwith.

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[1] 28 U.S.C. §1826(b) requires this Court to dispose of the appeal as soon as practicable, but no later than thirty (30) days from the filing of the appeal.

APPENDIX 3

PROFESSIONAL SERVICE CORPORATION ACT

AN ACT authorizing the formation of Professional Service Corporations.

P.A. 76-1283, eff. Sept. 15, 1969.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

415—1. § 1. *Short Title).* This Act shall be known and may be cited as "The Professional Service Corporation Act."

415—2. § 2. *Legislative Intent).* It is the legislative intent to provide for the incorporation of an individual or group of individuals to render the same professional service to the public for which such individuals are required by law to be licensed or to obtain other legal authorization, while preserving the established professional aspects of the personal relationship between the professional person and those he serves professionally.

415—3. § 3. *Definitions).* In this Act the terms defined in Sections 3.1 through 3.5 have the meanings ascribed to them in those Sections unless a contrary meaning is clear from the context.

415—3.1 *Ancillary personnel.*] § 3.1. "Ancillary personnel" means such person acting in their customary capacities, employed by those rendering a professional service who:

(1) Are not licensed to engage in the category of professional service for which a professional corporation was formed; and

(2) Work at the direction or under the supervision of those who are so licensed; and

(3) Do not hold themselves out to the public generally as being authorized to engage in the practice of the profession for which the corporation is licensed; and

(4) Are not prohibited by the licensing authority regulating the category of professional service rendered by the corporation from being so employed and includes clerks, secretaries, technicians and other assistants who are not usually and ordinarily considered by custom and practice to be rendering the professional services for which the corporation was formed.

415—3.2 *Regulating authority.*] § 3.2. "Regulating authority" means the State board, department, agency or the Supreme Court of Illinois (in the case of attorneys at law) having jurisdiction to grant a license to render the category of professional service for which a professional corporation has been organized.

415—3.3 *License.*] § 3.3. "License" includes a license, certificate of registration or any other evidence of the satisfaction of the requirements of this State for the practice of a professional service.

415—3.4 *Professional Corporation.*] § 3.4. "Professional Corporation" means a corporation organized under this Act solely for the purpose of rendering one category of professional service and which has as its shareholders, directors, officers, agents and employees (other than ancillary personnel) only individuals who are duly licensed by this State to render that particular category of professional service (except that the secretary of the corporation need not be so licensed).

415–3.5 *Professional Service.*] § 3.5. "Professional Service" means any personal service which requires as a condition precedent to the rendering thereof the obtaining of a license and which prior to the effective date of this Act could not be performed by a corporation by reason of law.

415–4. *Application of Act–Exclusions.*] § 4. "The Business Corporation Act" filed July 13, 1933, as now or hereafter amended, shall be applicable to professional corporations organized under this Act, and they shall enjoy the powers and privileges and be subject to the duties, restrictions, and liabilities of other corportions, except where inconsistent with the letter and purpose of this Act. This Act shall take precedence in the event of any conflict with provisions of The Business Corporation Act or other laws.

This Act shall not apply to any persons within this State who prior to the passage of this Act were rendering personal services by means of a corporation, nor to any corporation organized by them presently in existence or hereafter organized, however such persons may elect to incorporate under the provisions of this Act, or to bring an existing corporation within the provisions of this Act by amending the articles of incorporation in such a manner as to be consistent with all the provisions of this Act and by affirmatively stating in the amended articles of incorporation that the shareholders have elected to bring the corporation within the provisions of this Act.

A professional association organized under the "Act to Authorize Professional Associations", approved August 9, 1961, as amended, may elect by resolution to bring the association under the provisions of this Act by authorizing its members to incorporate under this Act and stating in

the articles of incorporation that the association shall be consolidated or merged with the professional corporation so formed. When the articles of incorporation have been filed with the Secretary of State, the professional corporation shall be deemed to have acquired the property and assets and assumed the liabilities of the association; and the association shall thereafter cease to exist as a separate identity.

Nothing contained in this Act shall alter the right of persons licensed to engage in the rendering of a personal service from so doing in any other business form permitted them by law.

The provisions of this Act shall not be considered as repealing, modifying or restricting the applicable provisions of law regulating the several professions except insofar as such laws are in conflict with the provisions of this Act, however, the provisions of this Act shall take precedence over any law which prohibits a corporation from rendering any type of professional services. Nothing contained in this Act shall prohibit a professional corporation from employing ancillary personnel.

415—5. *Consolidation—Merger.*] § 5. A professional corporation organized under this Act may consolidate or merge only with another domestic professional corporation organized under this Act to render the same specific professional service and a merger or consolidation with any foreign corporation is prohibited. A professional association organized under the "Act to Authorize Professional Associations", approved August 9, 1961, as amended, may merge with a professional corporation formed under this Act by complying with Section 4 of this Act.

415–6. *Organization—Articles of incorporation.*] § 6. One or more individuals each of whom is licensed to perform the same professional service in this State may organize a professional corporation by filing articles of incorporation with the Secretary of State on forms furnished by the Secretary. Such articles of incorporation shall meet the requirements of "The Business Corporation Act" and in addition thereto state the specific profession to be practiced by the professional corporation.

A certificate or facsimile thereof by the appropriate regulating authority that each of the incorporators is duly licensed to practice such profession shall accompany the articles of incorporation.

A professional corporation may be organized under this Act only for the purpose of rendering one specific type of professional service and services ancillary thereto.

415–7. *Services rendered only by licensed officers, employees and agents.*] § 7. No corporation organized and incorporated under this Act may render professional services, except through its officers, employees and agents who are duly licensed or otherwise legally authorized to render such professional services within this State. The term "employee" as used in this Act does not include "ancillary personnel" as that term is used in this Act.

415–8. § 8. *Professional relationship unaffected—Personal and corporate liability).* Nothing contained in this Act shall be interpreted to abolish, repeal, modify, restrict or limit the law now in effect in this State applicable to the

professional relationship and liabilities between the person furnishing the professional services and the person receiving such professional service and to the standards for professional conduct. Any officer, shareholder, agent or employee of a corporation organized under this Act shall remain personally and fully liable and accountable for any negligent or wrongful acts or misconduct committed by him, or by any ancillary personnel or person under his direct supervision and control, while rendering professional services on behalf of the corporation to the person for whom such professional services were being rendered. However, a professional corporation shall have no greater liability for the conduct of its agents than a general business corporation. The corporation shall be liable up to the full value of its property for any negligence or wrongful acts or misconduct committed by any of its officers, shareholders, agents or employees while they are engaged on behalf of the corporation in the rendering of professional services.

The relationship of an individual to a professional corporation organized under this Act, with which such individual is associated, whether as a shareholder, director, officer or employee, shall in no way modify or diminish the jurisdiction over him of the governmental authority or State agency which licensed, certified or registered him for a particular profession.

All rights and obligations pertaining to communications made to, or information received by, any qualified person, or his advice thereon, shall be extended to the professional corporation of which he is a shareholder or employee, and to the corporation's officers, employees and ancillary personnel.

415–9. *Corporate name—Fictitious names—Filing under assumed name law.*] § 9. A professional corporation shall adopt a name consisting of the full or last name of one or more of its shareholders; except that if not otherwise prohibited by law, rules of a regulating authority or the canons of ethics of the profession concerned, a professional corporation may adopt a fictitious name. If the corporation does adopt a fictitious name or continues to use the name of a deceased shareholder, the name of a member of a predecessor organization, it shall file with the county clerk of the county where its principal place of business is located, under "An Act in relation to the use of an assumed name in the conduct or transaction of business in this State," approved July 17, 1941, as now or hereafter amended. It shall be permissable for a professional corporation to continue to use the name of a deceased shareholder for a period of one year after his death without recording the name of the corporation with the county clerk as hereinabove provided. A professional corporation may continue to use the name of a shareholder who voluntarily withdraws from the corporation if the withdrawing shareholder files with the regulating authority his written permission for the continued use of his name by the professional corporation. This permission shall remain in effect until written revocation has been received by the regulating authority from the former shareholder.

The corporate name shall end with the word "chartered" or "Limited" or the abbreviation "Ltd.", or with the words "Professional Corporation" or the abbreviation "Prof. Corp." or the initials "P.C.".

415–10. *Board of directors—Number of directors—Officers.*] § 10. A professional corporation organized under this Act shall be governed by a board of directors elected

by the shareholders and represented by officers elected by the board of directors, and, if desired, by an executive committee elected by the board of directors. If such corporation has only one shareholder it need have only one director who shall be such shareholder and shall also serve as president and secretary of the corporation. If such corporation has only 2 shareholders it need have only 2 directors who shall be such shareholders and they shall fill the offices of president, vice-president, secretary and treasurer of the corporation between them.

415—11. *Shareholders — Qualifications — Voting trusts prohibited — Purchase or redemption of shares upon death or disqualification of shareholder.*] § 11. No corporation organized under this Act may issue any of its capital stock to anyone other than an individual who is duly licensed or otherwise legally authorized to render the same specific professional services as those for which the corporation was organized. No shareholder shall enter into a voting trust agreement or any other type of agreement vesting another person with the authority to exercise the voting power of any of his stock.

No individual shall hold stock or in any way have an interest in more than one corporation organized under this Act.

The articles of incorporation shall provide for the purchase or redemption of the shares of any shareholder upon his death or disqualification, or the same may be provided for in the by-laws of the corporation or in a separate agreement of the interested parties.

If the articles of incorportion, by-laws or separate agreement fail to state a price or method of determining a fixed price at which the corporation or its shareholders may

purchase the shares of a deceased shareholder, or a shareholder no longer qualified to own shares in the corporation, then the price for such shares shall be the book value as of the end of the month immediately preceding the death or disqualification of the shareholder. Book value shall be determined from the books and records of the corporation in accordance with the accounting methods used by the corporation.

415–12. § 12. *Certificate of Registration—Fee—Renewal—Posting—Assignment).* No corporation shall open, operate or maintain an establishment for any of the purposes for which a corporation may be organized under this Act without a certificate of registration from the regulating authority authorized by law to license individuals to engage in the profession concerned. Application for such registration shall be made in writing, and shall contain the name and address of the corporation, and such other information as may be required by the regulating authority. Upon receipt of such application, the regulating authority, or some administrative agency of government designated by it, shall make an investigation of the corporation. If the regulating authority is the Supreme Court it may designate the bar or legal association which investigates and prefers charges against lawyers to it for disciplining. If such authority finds that the incorporators, officers, directors and shareholders are each licensed pursuant to the laws of Illinois to engage in the particular profession involved (except that the secretary of the corportion need not be so licensed), and if no disciplinary action is pending before it against any of them, and if it appears that the corporation will be conducted in compliance with the law and the regulations and rules of the regulating authority, such authori-

ty, shall issue, upon payment of a registration fee of $25, a certificate of registration which shall remain effective until January first following the date of such registration.

Upon written application of the holder, accompanied by a fee of $10, the regulating authority which originally issued the certificate of registration shall renew the certificate if it finds that the corporation has complied with its regulations and the provisions of this Act.

The certificate of registration shall be conspicuously posted upon the premises to which it is applicable, and the professional corporation shall have only those offices which are designated by street address in the articles of incorporation, or as changed by amendment of such articles. No certificate of registration shall be assignable.

415—13. *Suspension or revocation of certificate of registration—Grounds—Notice—Judicial review.*] § 13. The regulating authority which issued the certificate of registration may suspend or revoke it for any of the following reasons:

(a) The revocation or suspension of the license to practice the profession of any officer, director, shareholder or employee not promptly removed or discharged by the corporation; (b) unethical professional conduct on the part of any officer, director, shareholder or employee not promptly removed or dischaged by the corporation; (c) the death of the last remaining shareholder, however, revocation of the certificate of registration by reason of the death of such last remaining shareholder shall not operate to dissolve the corporation but shall operate to convert such corportion into a business corporation only; or (d) upon finding that the holder of a certificate has failed to comply with the provisions of this Act or the regulations prescribed by the regulating authority that issued it.

Before any certificate of registration is suspended or revoked, the holder shall be given written notice of the proposed action and the reasons therefor, and shall provide a public hearing by the regulating authority, with the right to produce testimony and other evidence concerning the charges made. The notice shall also state the place and date of the hearing which shall be at least 10 days after service of said notice.

All orders of regulating authorities denying an application for a certificate of registration or suspending or revoking a certificate of registration shall be subject to judicial review pursuant to the provisions of the "Administrative Review Act", approved May 8, 1945, as now or hereafter amended, and the rules adopted pursuant thereto then in force.

415—14. *Renewal of certificate.*] § 14. At the time of the filing of the written application by the corporation for the renewal of its certificate under Section 12 of this Act, such corporation shall also file with the appropriate regulating authority a certificate giving the name and residence addresses of all shareholders as of the last day of the month preceding such filing, and certifying that all such shareholders are duly licensed to render the same professional services as those for which the corporation was organized. This certificate shall be made on a form prescribed and furnished by the appropriate regulating authority, shall be signed by the president or vice-president and attested by the secretary or assistant secretary of the professional corporation, and acknowledged and sworn to before a notary public by the persons executing the certificate.

415—15. § 15. *Nature of corporate activities — Investment of funds).* A profesional corporation may only engage in the rendering of one category of professional service and may render such profesional service only through shareholders, directors, officers, agents and employees who are themselves duly licensed in that category of professional service. No person who is not licensed in that category of professional service shall have any part in the ownership, management or control of the corporation, nor may any proxy to vote any shares of such corporation be given to a person who is not so licensed.

415—16. § 16. *Construction—Attorneys at law).* The provisions of this Act shall not be construed as limiting the rendering of professional services or the practice of any profession under any other provision of law. However, the provisions of this Act shall be applicable to attorneys at law only to the extent and under such terms and conditions as the Supreme Court of Illinois shall determine to be necessary and appropriate. Articles of incorporation of professional corporations organized to practice law shall contain such provisions as may be appropriate to comply with applicable rules of such court.

415—17. § 17. *Severability clause).* If any provision of this Act or the application thereof to any person or circumstance is invalid, such invalidity shall not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

APPENDIX 4

(Supreme Court Rule 721). Professional Service Corporations and Associations for the Practice of Law

(a) Professional service corporations formed under the Professional Service Corporation Act, H.B. 664, approved September 15, 1969, (Ill.Rev.Stat.1969, ch. 32, § 415—1 et seq.) or professional associations organized under the Professional Associations Act (Ill.Rev.Stat.1967, ch. 106½, § 101 et seq.) may engage in the practice of law provided that:

(1) All shareholders, officers and directors of the corporation or members of the association, and others of its employees engaged in the practice of law shall be members of the bar of Illinois.

(2) The corporation or association shall do nothing which, if done by an individual attorney, would violate the standards of professional conduct applicable to attorneys licensed by this court.

(b) This rule does not diminish or change the obligation of each attorney engaged in the practice of law in behalf of the corporation or association to conduct himself in accordance with the standards of professional conduct applicable to attorneys licensed by this court. Any attorney who by act or omission causes the corporation or association to act in a way which violates standards of professional conduct, including any provision of this rule, is personally responsible for such act or omission and is subject to discipline therefor. Any violation of this rule by the corporation or association is a ground for the court to terminate or suspend the right of the corportion or association to practice law or otherwise to discipline it.

(c) No corporation or association shall engage in the practice of law under the Professional Service Corporation Act or the Professional Associations Act, or open or maintain an establishment for that purpose, without a certificate of registration issued by this court.

(d) The articles of incorporation or association shall provide and the shareholders of the corporation or members of the association shall be deemed to agree by virtue of becoming shareholders or members that all shareholders or members shall be jointly and severally liable for the acts, errors and omissions of the shareholders or members and other employees of the corporation or association arising out of the performance of profesional services by the corporation or association while they are shareholders or members.

(e) An application for registration shall be in writing signed by all shareholders of the corporation or members of the association and filed with the clerk of this court with a fee of $25. The application shall contain the following:

1. The name and address of the corporation or association.
2. The statute under which it is formed.
3. The names and residence addresses of the shareholders of the corporation or members of the association.
4. A statement of whether the corporation or association is on a calendar or fiscal year basis and if fiscal, the closing date.
5. A statement that all shareholders or members, directors and officers of the corporation or association are members of the bar of Illinois and that no disciplinary action is pending against any of them.

6. Such other information and documents as the court may from time to time require.

(f) A certificate of registration shall continue in effect until it is suspended or revoked subject, however, to renewal annually within 30 days following the close of each calendar year. The application for renewal shall be signed by all shareholders or members and filed with the clerk of this court with a filing fee of $10. It shall state the name of the corporation or association, the names and residence addresses of the shareholders of the corporation or members of the association and shall certify that all shareholders or members, directors and officers are members of the bar of Illinois. No certificate is assignable.

(g) Nothing in this rule modifies the attorney-client privilege.

(h) Associations which have heretofore organized under the Professional Associations Act have until January 31, 1970, to comply with the provisions of this rule.

(i) This rule shall be effective November 15, 1969.

APPENDIX 5

Subpoena Duces Tecum — Grand Jury

UNITED STATES DISTRICT COURT
Northern District of Illinois

July Session, 1972

THE PRESIDENT OF THE
UNITED STATES OF AMERICA

TO: Bruce W. Bublick Ltd., or any Authorized Officer or Agent
111 E. Wacker Drive
Chicago, Illinois — GREETING:

YOU ARE HEREBY COMMANDED that laying aside all and singular your business and excuses you be and appear before the Grand Jury of the United States District Court for the Northern District of Illinois, in Room 1500, United States Courthouse, in the City of Chicago, in said District, on the 28th day of August, A.D. 1972, at 2:00 o'clock P.M. of said day, and also that you bring with you and produce at the time and place aforesaid . . . corporate minute books, bank statements, cancelled checks, deposit slips and check ledgers for the period from April 30, 1970 to and including the present.

on behalf of the United States, and not depart the Court without leave thereof or of the United States Attorney. And this you shall in nowise omit under the penalty of the law in that case made and provided.

To the Marshal of or any other authorized law enforcement agent of the Northern District of Illinois to execute

NOTE: Your appearance may not be required at the exact time specified on the subpoena. Upon receipt of the subpoena, please contact Assistant United States Attorney, S. J. Kadison, at 312/353-4129, and advise him, or his secretary, of a telephone number at which you may be reached during the day and in the evening.

Dated: August 22, 1972

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-578

BRUCE W. BUBLICK, A WITNESS BEFORE THE JULY 1972 GRAND JURY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On August 28, 1972, petitioner appeared before the July 1972 federal grand jury in the Northern District of Illinois in response to a subpoena duces tecum. The subpoena, addressed to "Bruce W. Bublick Ltd., or any Authorized Officer or Agent", called for the production of "corporate minute books, bank statements, cancelled checks, deposit slips and check ledgers for the period from April 30, 1970 to and including the present" (Pet. App. 5, p. 20).[1] Bruce W. Bublick Ltd.

[1] The grand jury was inquiring into possible mail fraud violations.

489-601—72

is a professional service corporation organized under the laws of Illinois and petitioner, an attorney, is the sole incorporator, director and shareholder of the corporation. He declined to produce the materials claiming that to do so would violate his Fifth Amendment privilege against compulsory self-incrimination.[2]

Petitioner was then brought before the district court pursuant to the government's motion for an order to direct compliance with the grand jury subpoena. After hearing arguments and taking evidence, the district judge, on August 31, 1972, ordered petitioner to comply, ruling that the documents of the corporation sought in the subpoena were not subject to an invocation of the Fifth Amendment privilege by petitioner. That same day petitioner was taken again before the grand jury and ordered to produce the corporate documents as required by the district court's order. He produced the corporate minutes but persisted in refusing to produce any of the other documents sought. The government then moved that petitioner be held in contempt for his failure to obey the court's order. The district judge, after hearing arguments, determined that petitioner was in contempt and directed that he be "committed to the custody of the United States Marshal for the Northern District of Illinois until such time as [petitioner] shall obey said order, or until such time as the July 1972 Grand Jury shall be discharged from further service, whichever is sooner" (Pet. App. 1, p. 2).

---

[2] No question of attorney-client privilege is presented by the facts of this case.

The court of appeals entered a stay of the district court's order. Thereafter on September 8, 1972, within the time provided by 28 U.S.C. 1826(b), it affirmed the adjudication of contempt, holding that "for purposes of determining whether the privilege against self-incrimination attaches to the appellant's refusal to produce documents and records, the professional service corporation is to be treated as any other corporation" (Pet. App. 2, p. 4). The court ordered that its mandate issue forthwith. On September 11, 1972, petitioner appeared before the grand jury and produced the documents required by the subpoena.

Petitioner contends that this Court should grant certiorari to resolve the question whether persons who incorporate their professional businesses under state professional service corporation laws may assert their Fifth Amendment privilege as to the corporate records. The controversy, however, is now moot.[3] Petitioner's argument to the contrary is largely predicated upon the erroneous assumption that his contempt adjudication was criminal in nature (see Pet., p. 12). To the contrary, the district judge's contempt order, which allowed petitioner to be relieved of the consequence of confinement by compliance with the order to produce the records, was not punitive but remedial, and as such constituted civil, not criminal, contempt. *Shillitani* v. *United States*, 384 U.S. 364, 368–372. Petitioner's reliance on *Sibron* v. *New York*, 392 U.S.

[3] *Dombrowski* v. *Pfister*, 380 U.S. 479 (Pet., p. 14) concerned continued "chilling" of First Amendment rights and is not apposite.

40, which deals with the continuing adverse consequences of criminal convictions is thus inapposite. In short, petitioner has chosen to comply with the district judge's order to produce the documents rather than continue to resist its legality, and there is no longer a true case or controversy sufficient to support review of the judgment of the court of appeals affirming the contempt commitment.

On the merits, the courts below correctly ruled that petitioner had no Fifth Amendment privilege as to the records of the corporation. This Court has consistently held that since "the privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of any organization, such as a corporation." *United States* v. *White*, 322 U.S. 694, 699; *Curcio* v. *United States*, 354 U.S. 118, 122; *Wilson* v. *United States*, 221 U.S. 361, 382–385. The rule has been applied even to a single shareholder corporation. *Grant* v. *United States*, 227 U.S. 74.* Although professional service corporations are in some respects different from other types of corporations—for example, in terms of personal liability of shareholders (see Pet., p. 10), and persons eligible to participate in such corporations—the records of such legal entities are not the private records of the individual

*See also *In re Mal Bros. Contracting Co.*, 444 F. 2d 613 (C.A. 3), certiorari denied, 404 U.S. 857, denying the right to invoke the Fifth Amendment privilege of a general partner as to partnership records.

members or shareholders of the organization and thus such members or shareholders are not entitled to invoke the Fifth Amendment privilege against their production by the corporation. See *United States* v. *White*, *supra*, 322 U.S. at 698–701; *Grant* v. *United States*, *supra*, 227 U.S. at 79–80.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972

COPY

DEC 4 1972

No. 72-578

In the Supreme Court of the United States

OCTOBER TERM, 1972

In Re:

BRUCE W. BUBLICK, A Witness Before The July, 1972 Grand Jury

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF

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REPLY BRIEF

The Solicitor General argues that the case is moot, but he does not advert to the continuing controversy between petitioner and the government regarding the applicability of the privilege against self incrimination to professional service corporations.

The government's argument concerning the distinction between civil and criminal contempt is a strawman, having

no relevance to this case. We concede that the District Judge's contempt order was civil in nature. The important question is not whether the contempt is civil or criminal, but rather whether there continues to be a controversy between the parties concerning the privilege against self incrimination. Since there clearly is such a controversy, and since petitioner has not waived his rights by producing the documents under threat of going to jail, the case is not moot and ought to be determined by this Court at the earliest opportunity.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION OF THE CHICAGO BAR ASSOCIATION AND THE ILLINOIS STATE BAR ASSOCIATION TO FILE BRIEF AMICUS CURIAE AND BRIEF

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Supreme Court, U.S.
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IN THE

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OCTOBER TERM, 1972

No. 72-578

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The Chicago Bar Association and the Illinois State Bar Association hereby respectfully moves for leave to file the following statement as a brief *amicus curiae*. Counsel for Petitioner have consented to the filing of this brief and counsel for respondent has likewise consented.

THE INTEREST OF AMICUS CURIAE

The movant Bar Associations are voluntary associations with a total membership of approximately 25,000 lawyers, and a number of the members of the two Associations have incorporated under the provisions of the Illinois Professional Service Corporation Act. The important question presented by this case is whether a lawyer who has incorporated under said Act has thereby impaired his privileges under the Fifth Amendment.

While declining to take a specific position on the merits of the instant case, the movant Associations support petitioner's contention that the controversy presents an important question of first impression highly deserving of consideration by this Court.

In Illinois, as in many other states, the entity known as the professional service corporation has become increasingly popular among professional men and women as a means of conducting their business affairs. However, since the concept is a relatively new one the law regarding the rights and responsibilities of such corporations and their incorporators, in contrast with the law pertaining to more conventional corporate organizations, is in many instances unsettled.

The issue presented by the instant Petition is whether or not a sole practitioner of law, incorporated under the terms of the Illinois Professional Service Corporation Act (Ill. Rev. Stat. 197, Ch. 32, sec. 415 et seq.), limits his Fifth Amendment privilege against self-incrimination by virtue of such incorporation. Obviously, the resolution of this issue is of vital importance to those lawyers and other professionals who have chosen to carry on their professional practice within the legal framework of a professional service corporation. While it has long been held that conventional business corporations, whose operations are essentially conducted by a number of people, have no constitutional right as a corporate entity to invoke the Fifth Amendment privilege of silence (*Hale* v. *Henkle*, 201 U.S. 43, 70 (1906); *Grant* v. *U.S.*, 2227 U.S. 74, 76 (1913), the limitations in scope and the inherent personal aspects of a professional service corporation would seem to justify the application of a different rule in the latter instance. If different standards exist for unincorporated professions vis-a-vis those who are incorporated concerning the right to invoke the Fifth Amendment privilege, the tax benefits to be gained through professional incorporation would seem to be sig-

stantially offset by the obvious dimunition of constitutional rights. The Court's answer to this question would appear to significantly affect the future of professional service corporations, not only in Illinois but in other states with comparable statutory provisions.

The Associations are in agreement with petitioner's position on the question of mootness in the instant case, since it does appear that a continuing controversy does indeed exist, and further litigation in the Courts below involving essentially a procedural problem would not seem to be prerequisite to invoking this Court's jurisdiction at this time.

For the foregoing reasons, it is respectfully suggested that the Petition for Writ of Certiorari be granted so that the Court may review and decide this question of wide concern to many lawyers and other professionals who now, or in the future, elect to practice as a professional service corporation.

Respectfully submitted,

PHILIP H. CORBOY, President
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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AMICUS CURIAE BRIEF OF THE CHICAGO COUNCIL OF LAWYERS

The Chicago Council of Lawyers, a voluntary association of approximately 1200 lawyers, hereby respectfully files the following *amicus curiae* brief in support of the Petition for Writ of Certiorari. Counsel for all parties have consented to this submission.

Some of the members of the Chicago Council of Lawyers, as well as others throughout the State, have incorporated or intend to incorporate under the provisions of the Illinois "Professional Service Corporation Act" of 1969 (32 Ill. Rev. Stat. § 415-1 *et seq.*). The Seventh Circuit Court of Appeals, with-

out any briefing and argument, has issued a highly unusual summary decision holding that those who incorporate under this statute lose their privilege against self-incrimination. Only this Court can authoritatively dispel the cloud thereby cast over the professional status of these persons. The central issue raised — whether incorporation under that or like statutes destroys an individual's privilege against self-incrimination — is of immediate concern to the members of our association, and we believe we can be of assistance to the Court in resolving it.

ARGUMENT

The novelty of this case resides in the unprecedented nature of the entity formed under the Illinois "Professional Service Corporation Act" of 1969. This act follows the pattern of similar statutes in other states in carving out a special and narrow method by which persons engaged in certain kinds of professional service, such as lawyers, doctors, accountants, etc., may "incorporate" and thereby take advantage of provisions of the federal tax code respecting pension and profit sharing plans without incurring otherwise onerous tax consequences. See Worthy, "IRS Chief Counsel Outlines What Lies Ahead for Professional Corporations", *Journal of Taxation* 88, 89 (February 1970).

But this act of incorporating does not significantly alter the professional or legal relations involved. Principally:

1. legal liabilities for professional malpractice and the conduct of professional life remain unchanged (32 Ill. Rev. Stat. § 415-8; Illinois Supreme Court Rule 721(d)); and

2. the relationship to the licensing and regulatory authority, the Supreme Court of Illinois, remains unchanged (32 Ill. Rev. Stat. §§ 415-7, -8, -15, -16, Illinois Supreme Court Rule 721(b)).

While certain other legal advantages and disadvantages may be implicated by this "incorporation" (see Ray, "Factors that go into Decision of Whether to Operate as a Professional Corporation", *The Journal of Taxation* 130 (March 1971)), it is nonetheless true that, as the IRS Chief Counsel has said:

> "The most important reason why professionals have incorporated is probably to take advantage of Code provisions relating to qualified pension and profit sharing plans for the benefit of employees." *Worthy, supra*, at 89.

Petitioner incorporated himself under the Illinois Act, becoming the sole incorporator, shareholder, board of directors and officer of his "corporation". He remains personally liable for his professional performance and his professional obligations are unchanged. Looking at Bruce W. Bublick as individual practitioner on the day before his incorporation, and "Bruce W. Bublick, Ltd." as professional service corporation on the day afterwards, it is difficult to see how, in terms of the relevant policies of the Fifth Amendment privilege against self-incrimination,* a significant step has been made which should deny him rights which existed the day before.

Nonetheless, following the Seventh Circuit's decision, he may have fallen into a constitutional trap. For while the Fifth Amendment's privilege against self-incrimination has long protected lawyers and other individuals from compulsory disclosure by government in the conduct of their personal business and professional affairs (*Boyd* v. *United States*, 116 U.S. 616, 630 (1886); *Spevack* v. *Klein*, 385 U.S. 511 (1967) (lawyer may not be disbarred for invoking privilege)), public "corporations" have traditionally been denied the right to invoke the privilege. *Hale* v. *Henkle*, 201 U.S. 43, 70 (1906).

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* "Thus we may view the historical development of the privilege as one which groped for the proper scope of governmental power over the citizen. As a 'noble principle often transcends its origins,' the privilege has come rightfully to be recognized in part as an individual's substantive right, a 'right to a private enclave where he may lead a private life. That right is the hallmark of our democracy.' *United States* v. *Grunewald*, 233 F.2d 556, 579, 581-582 (Frank, J., dissenting), rev'd, 353 U.S. 391 (1957). We have recently noted that the privilege against self-incrimination—the essential mainstay of our adversary system—is founded on a complex of values, *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 55-57, n. 5 (1964); *Tehan* v. *Shott*, 382 U.S. 406, 414-415, n. 12 (1966). All these policies point

The reason for this is expediency. As this Court said in *Hale*

> "A privilege so extensive might be used to put a stop to the examination of every witness who was called upon to testify before the grand jury . . ." (201 U.S. at 70.)

When in 1913 a case came before this Court involving the efforts by a sole shareholder of an otherwise public business corporation to invoke the privilege as to corporate documents, without "extended discussion" this Court applied the public "corporation" rule to deny him the protection he sought. *Grant and Burlingame* v. *United States*, 227 U.S. 74, 79 (1913). *Grant* resolved the conflict between considerations of efficiency reflected in *Hale* and constitutional policies of "personal security" reflected in the Fifth Amendment's privilege (*Malloy* v. *Hogan*, 378 U.S. 1, 8 (1964)) in favor of efficiency.

It would seem that the novel and limited type of corporation involved here is sufficiently distinguishable from both the public and the usual closed or single shareholder corporation to require a different result than *Grant*. Contrary to the impli-

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to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load,' 8 Wigmore, Evidence 317 (McNaughton rev. 1961), to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth. *Chambers* v. *Florida*, 309 U.S. 227, 235-238 (1940). In sum, the privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.' *Malloy* v. *Hogan*, 378 U.S. 1, 8 (1964)." *Miranda* v. *Arizona*, 384 U.S. 436, 460 (1966).

cations of the Seventh Circuit's summary disposition, there was nothing inevitable in their result. In *United States* v. *White*, 322 U.S. 694, 701 (1944) (unincorporated labor union held too "impersonal" to permit application of the privilege as to its officers), this Court rejected the sort of "mechanical comparison" of entities employed by the Seventh Circuit:

> "The test, rather, is whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only."

The simple act of incorporating under the Illinois professional service corporation act hardly creates group interests where none previously existed.

Given the narrow purpose and effect of this Illinois Act, and the continuing decidedly personal nature of the service afforded, this Court should consider whether the concepts of expediency and efficiency advanced to deny *public* corporations the protection of the privilege in *Hale* v. *Henkel* should control here over the important privacy policies embodied in the Fifth Amendment. Recently this Court faced a similar conflict in *Bloom* v. *Illinois*, 391 U.S. 194 (1968), in which it was decided that punishments for criminal contempt in excess of that afforded "petty offenses" cannot be imposed without a jury trial. As here, the argument against affording the constitutional right invoked burden, expense and inefficiency. This Court said that:

> "When a serious contempt is at issue, considerations of efficiency must give way to the more fundamental interest of ensuring the even-handed exercise of judicial

> power . . . Perhaps to some extent we sacrifice efficiency, expedition, and economy, but the choice in favor of jury trial has been made and retained, in the Constitution." *Bloom* v. *Illinois*, 391 U.S. at 209.

In a host of other decisions in recent years, this Court has similarly rejected arguments based on the "efficiency" of the criminal process on favor of procedural guarantees reflecting important constitutional values. See *e.g.*, *Mayer* v. *City of Chicago*, 404 U.S. 189, 196-197 (1971) (free transcripts to indigents in petty cases); *Miranda* v. *Arizona*, 384 U.S. 436 (1966) (warnings and counsel before confessions); *Chimel* v. *California*, 395 U.S. 752 (1969) (searches); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (counsel at trial); *United States* v. *Wade*, 388 U.S. 218 (1967); *Gilbert* v. *California*, 388 U.S. 263 (1967) (counsel at police lineups); *Duncan* v. *Louisiana*, 391 U.S. 145 (1968) (jury trials for serious crimes). Certainly the privilege against self-incrimination "—the essential mainstay of our adversary system—" (*Miranda* v. *Arizona*, 384 U.S. at 460), deserves its high place among these values and closer consideration than the short shrift accorded it here by the Seventh Circuit Court of Appeals.

THIS CASE IS NOT MOOT

The fact that Petitioner turned over the documents in question to the grand jury under protest rather than go to jail does not deprive this Court of jurisdiction over what is obviously a continuing live and vital controversy. Petitioner has been adjudged in contempt and suffers this continuing blot on his professional record. The status of similar professional corporations throughout the country continues in doubt. Nothing can be gained by deferring consideration of this obviously inevitable issue.

CONCLUSION

For the foregoing reasons, the Chicago Council of Lawyers respectfully urges this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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